opinion of the three-judge panel of the United States Court of Appeals for the Second Circuit reported at 265 F. 2d 136, 140. The opinion of the three-judge panel of the Court of Appeals, the original opinion of the Court of Appeals on petition for rehearing *en banc* (subsequently vacated by this Court's decision in *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685) and the opinion of the Court of Appeals denying the petitions for further rehearing *en banc* are reported at 265 F. 2d 136. The *en banc* decision of the Court of Appeals upon remand of the case from this Court (Pet. App. in No. 290, pp. 25–60; Pet. App. in No. 332, pp. 27a–68a) is reported at 291 F. 2d 598.

JURISDICTION

The judgments of the Court of Appeals, sitting *en banc* (Pet. App. in No. 290, p. 61; Pet. App. in No. 332, pp. 69a–72a), were entered on May 26, 1961. The petition for a writ of certiorari in No. 290 was filed on August 5, 1961. The petition for a writ of certiorari in No. 332 was filed on August 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals properly held that petitioners' libels, insofar as they alleged illegality of the rate of additional charter hire, were time-barred under the limitations provision of the Suits in Admiralty Act.

STATUTE AND CHARTER PROVISION INVOLVED

Section 5 of the Suits in Admiralty Act, 41 Stat. 526, 46 U.S.C. 745, provides in pertinent part:

> Suits * * * may be brought only within two years after the cause of action arises * * *.

Clause 13 of the charters provides:

> *Additional Charter Hire.*—If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum of the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D.C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):
>
> Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.
>
> Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in

excess of $300 per day—75% on such excess over $100 per day.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day.

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (Warship-demiseout) charter (prior to the times of payment provided for above or in such Warship-demiseout charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

STATEMENT

1. THE NATURE OF THE LITIGATION

Each of the petitioners chartered ships from the government pursuant to the Merchant Ship Sales Act of 1946, 50 U.S.C. App. 1735, *et seq.*, and agreed in Clause 13 of their charters, *supra*, pp. 3–4, to terms which made additional charter hire dependent in part upon the amount of profit realized by the charterer. Petitioners' libels below were predicated,

in principal part, on the claim that the Maritime Commission—in providing for a "sliding scale" whereby the government might obtain as much as 90% of the profits in excess of $300 per day, per vessel, above a certain return on employed capital—had not acted under Section 5(b) of the Merchant Ship Sales Act of 1946, 60 Stat. 41, 50 U.S.C. App. 1735, *et seq.*, and had violated the provisions of Section 709(a) of the Merchant Marine Act of 1936, 49 Stat. 1985, 46 U.S.C. 1199(a), which petitioners seek to read as limiting the government to a flat 50% of profits above the return on employed capital. Petitioners sought to recover amounts of additional charter hire in excess of this 50% rate, on the theory that such amounts were illegally assessed by the Commission (*e.g.*, Pet. App. in No. 290, pp. 28–30). In addition, certain of the libels challenged methods of accounting used by the Commission and the Commission's disallowance of certain expenditures involving determinations under the charters as to the amount of "capital necessarily employed," "post-redelivery overhead expenses", "the cost of repairing latent defects", "management fees" and "agency fees" (Pet. App. in No. 290, pp. 29–30).

In each case, the government moved to dismiss the libel because of lack of jurisdiction, on the ground that all of the claims were barred by the two-year limitation prescribed by the Suits in Admiralty Act, 46 U.S.C. 745, *supra*, p. 3.

The facts, varying as to payments of hire and redelivery of the vessels in each case, are, most briefly, as follows. The charters were entered into at various

times commencing in 1946, and each contained Clause 13, *supra,* pp. 3–4. Redelivery of the vessels and termination of active operation under the charters took place in each instance more than two years prior to the filing of the libels. Some of the charterers made final payments of additional charter hire within two years of filing their libels, others did not (*e.g.,* Pet. App. in No. 290; p. 30). In no case was a libel filed within two years of the time that the charters were executed and petitioners assertedly protested the legality of the "sliding scale"; nor in any case was a libel filed within two years after the first preliminary payments of additional charter hire were made (*e.g.,* Pet. App. in No. 290; pp. 31–33).

2. THE PROCEEDINGS PRIOR TO THE EN BANC DECISION BELOW

In the District Court, the libels were dismissed by Judges Palmieri and Herlands as time-barred, on the authority of the Second Circuit decisions in *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, affirmed on rehearing, 230 F. 2d 75, affirmed on the question of admiralty jurisdiction, 351 U.S. 976, and *American Eastern Corp.* v. *United States,* 133 F. Supp. 11 (S.D. N.Y.), affirmed *per curiam,* 231 F. 2d 664, certiorari denied, 351 U.S. 983.[1]

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[1] The course of the proceedings below prior to this Court's decision in *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, and the subsequent *en banc* decision of the Second Circuit, is traced in more detail in the brief for the United States in this Court in *American-Foreign*, No. 138, October Term, 1959.

These decisions were affirmed by a three-judge panel of the Second Circuit on the basis of the rulings in *Sword Line* and *American Eastern, supra.* Rehearing *en banc* was then ordered. On the original rehearing *en banc,* a majority of the Court of Appeals, consisting of Judges Hincks, Moore and Medina, overruled *Sword Line* and *American Eastern,* and held that Clause 13 of the charters established an adequate *prima facie* showing of jurisdiction, *i.e.,* that the libels were filed within two years after the causes of action arose. The court remanded the cases for the taking of further evidence as to the meaning of this clause and for final disposition of the limitations issue on the basis of such evidence. In dissent, Judges Clark and Waterman observed that the normal rule in actions for unjust enrichment,[2] as declared by the Second Circuit in ruling on the same question of limitations in *Sword Line* and *American Eastern* (which also involved Clause 13), is that the period begins to run when the first payment of additional charter hire is made. In their view, this rule should be set aside only if the charter plainly manifests a contrary purpose, and they felt that even the majority had found no such contrary expression of intention in Clause 13; moreover, analysis of this clause and the underlying regulations clearly demonstrated that they were in no way concerned with libelants' claim of

[2] These libels for allegedly illegal assessment of additional charter hire were characterized as actions for unjust enrichment in this Court's decision in *Sword Line, Inc.* v. *United States,* 351 U.S. 976.

illegal assessment of additional charter hire and that the Second Circuit's earlier decisions in *Sword Line* and *American Eastern* were correct.

After the government's petition for further rehearing *en banc* was denied, this Court granted certiorari and ruled in the government's favor on the limited issue that Judge Medina had no right to participate in the *en banc* decision since he had retired after the *en banc* rehearing had been ordered but prior to decision. *United States* v. *American-Foreign Steamship Corporation,* 363 U.S. 685. The Court vacated the *en banc* decision and remanded the causes to the Second Circuit for further proceedings. Petitioners' conditional cross-petitions, seeking review of the limitations issue, were denied. 363 U.S. 841; 363 U.S. 842.

3. THE EN BANC DECISION BELOW

Upon remand, the Second Circuit ordered a new rehearing *en banc,* with active Circuit Judges Clark, Waterman, Moore, Friendly and Smith participating.[3] The government prevailed on the issue of whether the libels, insofar as they challenged the legality of the rate of additional charter hire, were time-barred. Speaking for a majority of himself and Judges Clark and Waterman, Judge Smith ruled that the libels, in this respect, were unaffected by the provisions of Clause 13 and consequently were barred

[3] Chief Judge Lumbard again did not take part, having disqualified himself because of prior connection with the case as United States Attorney.

by the limitations provision of the Suits in Admiralty Act. Noting that the controversies were ripe for action when the libelants protested the legality of the "sliding scale" rate in 1946, Judge Smith observed that suits for a declaratory judgment should have been brought at that time, or suits for refund should have been brought, at the latest, upon the first payments of additional hire under the disputed rate (Pet. App. in No. 290, pp. 31–32). Indeed, libelants, as a further alternative, could have refused to make these payments and forced the government to sue them for the amount assessed under the "sliding scale" (Pet. App. in No. 290, pp. 32–33). On his analysis of the language of Clause 13 and the evidence submitted by affidavit by libelants, Judge Smith found that this clause could not conceivably bear the heavy weight of the interpretation libelants wished to place on it, *i.e.*, that it postponed the need to sue with regard to the assertedly illegal rate until years after payments of additional charter hire and redelivery of the vessels (Pet. App. in No. 290, pp. 33–38). The payments of additional charter hire made within two years of filing a libel but after redelivery of the vessels, the majority held, were clearly voluntary and not recoverable in an action against the United States (Pet. App. in No. 290, pp. 40–42).

Judge Smith ruled differently with respect to those claims in certain libels not involving the asserted illegality of the rate but challenging certain accounting procedures employed by the Maritime Commission and its disallowance of certain expenditures (Pet.

App. in No. 290, pp. 38–40). In his view, Clause 13 might conceivably apply to certain of these "accounting" claims, and the libels asserting them should be remanded for the taking of further evidence.[4]

Judges Clark and Waterman agreed with Judge Smith on the illegal rate ruling, reiterating their earlier view (in the prior *en banc* proceeding) that not only Clause 13 but the Maritime regulations were completely inconsistent with petitioners' claim of postponement of the need for bringing suit on this issue. Furthermore, in their view, Clause 13 could not be read to save any of the claims asserted in the libels, those covering accounting procedures as well as those challenging the legality of the "sliding scale".

Judges Friendly and Moore dissented, agreeing with the majority in the prior *en banc* determination that the causes should all be remanded for the taking of further evidence as to the meaning of Clause 13 with respect to the issue of the timeliness of the libels (Pet. App. in No. 290, pp. 49–60).

ARGUMENT

For the fourth time since the inception of litigation on these claims, the specific issue raised by petitioners has now been brought to this Court. In each prior instance, the Court has refused to take the question. With valid *en banc* resolution (consistent in result

[4] The United States is filing a conditional cross-petition with regard to this part of the decision, asking that, if the Court grant writs of certiorari in Nos. 290 and 332, it take the entire case including the ruling of the majority below remanding the questions concerning accounting procedures.

with the prior Second Circuit panel decisions in *Sword Line* and *American Eastern*) now accomplished, there is less reason for a grant of certiorari at this time than there was previously. Moreover, the Second Circuit's *en banc* decision is admittedly not in conflict with any other ruling on the limitations issue presented by these cases. That issue was correctly decided below, and is confined to similar litigation pending in other courts which was likewise pending at the time of this Court's earlier denials of certiorari.

1. As petitioners point out (Pet. in No. 290, p. 12; Pet. in No. 332, p. 23), this is the fourth time that the limitations issue raised by their petitions has been brought to this Court. In *Sword Line, Inc.* v. *United States,* 228 F. 2d 344, affirmed on rehearing, 230 F. 2d 75, the Second Circuit for the first time ruled on the question of limitations in a suit similar to those involved here, challenging the legality of the rate of additional charter hire, and held that the libel was time-barred. This Court granted the libelant's petition for a writ of certiorari, limiting that grant, however, to the question of admiralty jurisdiction, upon which it affirmed the lower court's decision. It did not take the limitations issue. 351 U.S. 976.

Subsequently, the Second Circuit affirmed, *per curiam,* the decision of the District Court for the Southern District of New York again holding such a libel time-barred. *American Eastern Corporation* v. *United States,* 133 F. Supp. 11 (S.D.N.Y.) affirmed, 231 F. 2d 664. Once again, this Court denied the libelant's petition for a writ of certiorari on the limi-

tations issue posed in the instant petitions. 351 U.S. 983. Finally, in the 1959 Term, the petitioners here filed conditional cross-petitions urging this Court, for the same reasons advanced in the prior petitions, to resolve the limitations issue. This Court denied those conditional cross-petitions. 363 U.S. 841; 363 U.S. 842.

Petitioners have not set forth any reasons why the limitations issue, limited to this type of case and chartering transaction, is any more deserving of resolution by this Court at the present time than it was on the earlier petitions. It is true that the government acquiesced in the granting of certiorari on the three prior occasions. However, it is clear by now that this Court views the issue as one not meriting further review here. On this ground alone the present petitions should be denied.[5]

2. While petitioners admit that there is no conflict between the decision below and that of any other court on the limitations issue (*e.g.*, Pet. in No. 290, pp. 15–16), they attempt to overcome this lack of intercircuit conflict by asserting as a basis for certiorari that the decision below creates an intracircuit conflict. We submit that, even were an intracircuit conflict a basis for this Court's review, the assertion that such a con-

[5] The bases for the government's past acquiescence, namely the amount of money involved and the number of pending lawsuits, are relied on once again by petitioners here. These factors, however, have all been brought to this Court's attention in the earlier petitions denied by the Court. Moreover, the government's acquiescence was based, in part, upon the desire to have the issue resolved more speedily. That resolution has now been sufficiently accomplished.

flict still exists is patently unsound in the face of the *en banc* resolution below. *En banc* resolution is, of course, the very method provided for a court of appeals to avoid conflicts of decision by different panels of its members. See *e.g.*, Maris, *Hearing and Rehearing Cases in Banc*, 14 F.R.D. 91, 96, cited by this Court in *United States* v. *American-Foreign Steamship Corp., supra*, 363 U.S. at 688, 690; see also *Wisniewski* v. *United States*, 353 U.S. 901. Such resolution was had below, and the result, moreover, is perfectly consistent with all prior panel decisions in these cases and the earlier suits of identical nature. The fact that there are a majority (including a concurrence) and a dissent does not establish an intracircuit conflict.

In addition, petitioners argue that the decision below is unclear and will be a confusing precedent for other courts before which similar litigation is pending. Judge Smith's view, however, is quite clear: the libels, insofar as they attacked the legality of the additional charter hire rate, should have been brought, at the earliest, within two years from the dates of execution of the charters after petitioners had protested, or, at the latest, within two years after they had made their first payments of additional charter hire under the protested rate. Judges Clark and Waterman agreed on this issue relating to the legality of the charter rate but would have gone further and held all claims time-barred, including those challenging accounting procedures (which Judge Smith held should be remanded for the taking of further evidence). Judges Friendly and Moore felt that all claims should

be remanded for the taking of further evidence as to the meaning of Clause 13. The lines thus drawn are plainly delineated. Other courts outside the Second Circuit, in which similar litigation is pending, may choose one view or the other as to whether the illegality claim and those with regard to accounting procedures are time-barred, but this Court need not ground a grant of certiorari on the mere possibility of a future conflict between the Second Circuit and another circuit on this type of issue.

3. The decision reached by the *en banc* court, moreover, is correct. Libelants have failed in their numerous opportunities to demonstrate the inapplicability of the normal rule that the time for bringing suits for unjust enrichment commences to run at the time of initial payment. As the majority below concluded, in accord with the prior Second Circuit panel decisions, Clause 13 cannot be read to bear the weight of petitioners' interpretation—that it was intended to postpone the necessity for their bringing suit on the claim of illegality of the additional charter hire rate until many years after the first payments of such hire, performance of the charters, and redelivery of the vessels (*e.g.*, Pet App. in No. 290, pp. 33–34). And, as Judges Clark and Waterman observed, with respect to the claims asserting illegality as well as those challenging accounting procedures, the underlying Maritime regulations, when read together with Clause 13, afford no support for petitioners' position (*e.g.*, Pet App. in No. 290, pp. 46–47).

4. The issue of limitations posed by these petitions is not a recurring one since it is confined to a form of

charter entered into pursuant to the Merchant Ship Sales Act of 1946, 50 U.S.C. App. 1735, *et seq.* On January 30, 1957, the provisions of Clause 13 were substantially changed so that the limitations problem appears no longer to be presented by charters pursuant to that Act. 22 F.R. 609. Moreover, chartering by the government of war-built cargo vessels subsequent to 1950 was sharply curtailed under the restrictions of Section 5(e) of the Act, 50 U.S.C. App. 1738(e),[6] and it is our understanding from the Maritime Commission that very few charters for cargo vessels, pursuant to the 1946 statute, are currently being executed.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for writs of certiorari should be denied.

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SEPTEMBER 1961.

[6] See 1950 U.S. Code Congressional Service, pp. 2656–2658.

U. S. GOVERNMENT PRINTING OFFICE 1961